

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

A.H., by her Guardian,)	
SHAYANNA JENKINS HERNANDEZ)	
Plaintiff)	
vs.)	
)	
NATIONAL FOOTBALL LEAGUE, THE)	
NATIONAL FOOTBALL LEAGUE)	
FOUNDATION, individually and as)	
successor in interest to NFL CHARITIES,)	
NFL PROPERTIES LLC, individually and)	
as successor in interest to NFL)	
PROPERTIES, INC., RIDDELL, INC.,)	
RIDDELL SPORTS GROUP, INC., ALL)	
AMERICAN SPORTS CORP., BRG SPORTS,)	
INC., f/k/a/ Easton-Bell Sports, Inc., BRG)	
SPORTS, LLC f/k/a Easton Bell Sports,)	
LLC, EB SPORTS CORP., and BRG SPORTS)	
HOLDING CORP. f/k/a RBG Holdings)	
Corp.,)	
Defendants)	

C.A. No.: 1:17-cv-12244-JCB

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY
AND REQUEST FOR EXPEDITED ADJUDICATION**

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Plaintiff Shayanna Jenkins Hernandez, on behalf of minor-child A.H., respectfully opposes Defendants' Motion to Stay Proceedings (D.E. 9) and requests expedited disposition of this motion alongside Plaintiff's Motion to Remand (D.E. 19). As supported herein, this Court should deny the proposed stay¹ and resolve federal subject-matter jurisdiction, following the lead of essentially every Court faced with this issue in the NFL-MDL context, and remaining consistent with its own prior rulings on stays pending JPML transfer.²

OVERVIEW

Before this Court are essentially two competing motions: (1) Plaintiff's Motion to Remand for lack of federal subject-matter jurisdiction; and, (2) Defendants' Motion to Stay Proceedings (i.e., the remand) pending JPML's decision on a Motion to Vacate Conditional transfer.³ Plaintiff submits that no federal jurisdiction exists over this matter, and asks the Court to deny a stay so this can be addressed and the action may properly proceed.

On October 16, 2017 Plaintiff filed her Complaint for loss of parental consortium against Defendants in Massachusetts Superior Court, which Defendants removed on November 14, 2017.

¹ Defendants have requested oral argument on their Motion To Stay (D.E. 9, Mem. at D.E. 10). Plaintiff's counsel defers to the Court, but views the request (on such a perfunctory motion) as attempt to overshadow and potentially confuse the Court's resolution of jurisdiction. Counsel prefers to stand on the papers and await disposition of these (essentially competing) motions. Should the Court desire argument, however, Plaintiff respectfully requests that it entertain argument over *both* motions concurrently.

² Plaintiff asks that this Court require Defendants' Opposition to Remand on the standard (14-day) schedule. Plaintiff would stand on her Motion and the Complaint under this circumstance (and not seek to file a Reply in Support), allowing the Court time to rule.

³ The parties have agreed to enlarge deadlines for matters *other* than remand. Defendants have indicated a desire to enlarge remand-related briefing deadlines; in light of the JPML's forthcoming hearing, Plaintiff seeks either an expedited or standard briefing schedule for that motion.

Defendants' sole basis for federal jurisdiction (there is no diversity) is the NFL's CBA, Section 301 of the Labor Management Relations Act. But Plaintiff's sole claim for loss of parental consortium does not implicate the NFL's CBA, nor do the underlying torts alleged to have injured the decedent. For these reasons, Plaintiff has moved to remand her Complaint to Massachusetts Superior Court. Defendants seek to delay resolution of this issue, so they seek to have Plaintiff's Complaint transferred to MDL No. 2323. They effectively ask this Court to punt on federal subject matter jurisdiction.⁴ Doing so would be inconsistent with the law.

This Court, the District of Massachusetts, stands in the best position to resolve its jurisdiction. It should not be duped by Defendants' newly-adopted⁵ and logically subsequent position that the decedent—and not the Plaintiff, whose claim is independent—is a purported member of the MDL No. 2323 settlement class. Defendants argue that Plaintiff's action constitutes the filing of a released claim, based on a flatly incorrect premise.⁶ Not only is the premise incorrect, but the question cannot be properly resolved until first “yield[ing] to statutory limitations

⁴ *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-2323-AB, (ECF 1, filed 01/31/12).

⁵ Undersigned counsel engaged in extensive logistics discussions with opposing counsel, following the voluntary dismissal of the prior action, and many times over the past month, and before the state court filing. While Defendants questioned the propriety of opposing JPML transfer (*see* Letter from Brad Sohn to Douglas Burns, dated October 23, 2017. Ex. “A”), they waited until the action was re-filed to—for the first time—assert the decedent's supposed settlement-class-member status.

⁶ The MDL No. 2323 settlement class covers only those retired and deceased NFL players who had retired on or before July 7, 2014. Although the Patriots released the decedent, there is a black-and-white distinction between having been released from an active roster and being retired. Moreover, even if Defendants' had this *defense* available to raise before a court with jurisdiction, it would be unavailing: neither Plaintiff nor the decedent (and his estate) have remedies under the “settlement.”

on federal jurisdiction.” *In re Mass. Diet Drug Litig.*, 338 F.Supp. 2d 198, 209 (D. Mass. 2004) (O’Toole, J.). The law and specifics of this situation strongly favor resolving jurisdiction before turning to any other issues created by Defendants.

Resolution of purported federal question jurisdiction turns upon Plaintiff’s operative pleading as removed,⁷ and not upon an MDL Master Complaint. Plaintiff’s sole claim arises from Massachusetts common law and, under these circumstances, “it is proper and efficient to rule on the pending motion[] to remand rather than wait for the JPML to decide whether to transfer ...” *In re Mass. Diet Drug Litig.* at 209. Just as was the case in *Mass Diet Drug Litig.*, here, too, critical issues of Massachusetts law are “unlikely to arise ... in other courts.” *Id.* Immediate resolution of jurisdiction, therefore, yields the optimal result and also follows the path recommended by the Manual for Complex Litigation, and as followed by both by this Court and by other courts adjudicating NFL-MDL stay/remand issues.

Defendants explain their request to stay proceedings largely through two unavailing arguments: (1) that the stay maximizes judicial resources, even though the stay will pass Plaintiff’s Complaint through *three* judicial systems; and, (2) that a stay would head off what Defendants deem to be “inconsistent rulings.” The first argument is illogical. The federal courts lack jurisdiction over Plaintiff’s Complaint from the outset, and it is unnecessary to expend the resources of three systems when the District Court should simply remand. The MDL Court is already taxed without having to resolve jurisdictional questions in the Massachusetts District Court. The second argument, the fear of “inconsistent rulings,” is moot, to the extent not specious. Removal triggers an individualized (*e.g.*, an allegation-and-claim-specific) inquiry: the Court

⁷ *In re Pharma. Ind. Avg. Wholesale Price.*, 509 F.Supp. 2d 82, 90 (D.Mass. 2007) (“[A] suit which, at the time of filing could not have been brought in federal court must remain in state court ...”) (*internal citations omitted*).

compares the operative Complaint, different in each instance, to the operative portions of the CBA supposedly at issue. Here, Plaintiff has sued a unique group of Defendants. And the cat is out of the bag: a half-dozen remand motions have already been ruled upon by federal district courts with reference to these issues; not to mention that MDL motion-practice concerns LMRA preemption in a 12(b)(6) context, not in a jurisdictional posture. In addition, litigation (indeed, even discovery) has already commenced outside of the MDL. Thus, legal and pragmatic concerns all favor denial of the requested stay and resolution of Plaintiff's Motion to Remand.

Defendants have belatedly⁸ raised decedent's purported class-membership to confuse the straightforward issues of jurisdiction. This manner of application is backward. It is axiomatic that the Court cannot reach issues prior to determining its own jurisdiction; only once a court has either (a) determined that federal jurisdiction exists, or (b) remanded the case to state court, can *any* court consider the Defendants' defenses (viability aside.) Defendants' baseless removal should not be rewarded with a stay, particularly in light of the guiding law.

Plaintiff's sole claim, loss-of-parental-consortium, belongs to the minor-child, independent of the decedent. Irrespective of decedent's phantom settlement-class membership, which Plaintiff vigorously disputes, Massachusetts law on parental consortium separates Plaintiff's claim from the decedent's claims; it belongs only to this child and not to the estate or decedent. As articulated in Plaintiff's Motion to Remand, Plaintiff's legally free-standing consortium claim is both bereft of federal jurisdiction *and also* impossible to release through a settlement Defendants purport to have bound only her father. (*See* D.E. 19, pp. 18-20 (Plfs' Mot. to Remand), § II(B)). For all of these reasons, adjudicating remand and thereby denying the stay prior to JPML transfer is optimal:

⁸ See footnote 5, *supra*.

it economizes judicial resources; it does not harm Defendants; and it minimizes prejudice to the Plaintiff.

ARGUMENT

I. PENDING JPML TRANSFER DOES NOT DIVEST THE COURT’S AUTHORITY

Defendants note the potential of a Notice of Potential Tag-Along Action with the MDL Panel and contemplate a yet-unrealized Conditional Transfer Order (“CTO”). In the event this indeed attaches in the coming days (presently it has not, making Defendants’ Motion unripe), Plaintiff will promptly file a Notice of Opposition to Transfer and supporting memorandum within the deadlines allotted. In the event no such CTO attaches, Defendants’ Motion to Stay should be denied as moot.⁹

Rule 2.1(d) of the Judicial Panel on Multidistrict Litigation specifically states the following:

The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in any pending federal district court action and does not limit the pretrial jurisdiction of that court. An order to transfer or remand pursuant to 28 U.S.C. § 1407 shall be effective only upon its filing with the clerk of the transferee district court.

JPML Rule 2.1 (previously R. 1.5; *see also In re Mass. Diet Drugs Litig.*, at 201).

This Court, as potential transferor Court, retains full jurisdiction over this action and as such, motions to remand should be resolved before the panel acts on the motion to transfer. *Spitzfaden v. Dow Corning Corp.*, 1995 U.S. Dist. LEXIS 16787, No. 95-2578, *4 n.1 (E.D. La. Nov. 8, 1995) (citing *Manual for Complex Litigation, Third* § 31.131 (3d ed. 1995); *Tortola Restaurants, L.P. v. Kimberly-Clark Corp.*, 987 F. Supp. 1186, 1188-1189 (N.D. Cal. 1997); *citing*

⁹ Defendants’ Motion is also premature, at present.

Manual for Complex Litigation, Third § 31.131, p.252 (3d ed. 1995); *See also Villarreal v. Chrysler Corp.*, 1996 U.S. Dist. LEXIS 3159, No. C-95-4414, 1996 at *1 (N.D. Cal. Mar. 12, 1996) (“[A] stay is improper. Judicial economy will be best served by addressing the remand issue [as it] will facilitate litigation in the appropriate forum.”)

II. LEGAL CONSIDERATIONS DO NOT WARRANT A STAY OF PROCEEDINGS

The *Manual for Complex Litigation, Fourth* §§ 20.131 and 22.35 state that during the pendency of a motion for MDL transfer, the potential transferor court retains jurisdiction over the case and need not suspend proceedings. Indeed, “[s]ince only one federal court needs to “make an individualized assessment of the jurisdictional issues in this case” there is no reason to transfer the jurisdictional issue to the MDL Court. *Hilbert v. Aeroquip, Inc.*, 486 F. Supp. 2d 135, 142 (D. Mass. 2007).

The cases specific to NFL-MDL-stays have followed this process. Defendants outlandishly claim that the federal courts have decided the issue of MDL stays in their favor. This is simply wrong. *Duerson v. Nat’l Football League*, 12-CV-02513, April, 19, 2012, Order (N.D. Ill.) (ECF 32) (Order denying Defs’ Mot. to Stay, attached as Ex. “B”). That Court stayed proceedings only *after* it first adjudicated remand, and found jurisdiction over one claim.

The *Manual for Complex Litigation (Fourth)* § 20.131 describes the following as preferred approach to stays of proceedings: When a CTO is pending subject to a motion to vacate, the District Court “should not automatically postpone rulings on pending motions, or generally suspend further proceedings.” *Ann. Manual Complex Lit.* § 20.131 (4th ed. 2017). Rather, the Manual sets out that “matters such as ***motions to dismiss or to remand, raising issues unique to the particular case***, may be particularly appropriate for resolution before the Panel acts on the motion to transfer.” *Id.* (emphasis added).

As the *Hilbert* Court noted, identically, “resolution of the motion to remand requires resolution of the unique facts of this case as presented to the Court.” *Hilbert*, 486 F. Supp. 2d at 142. Simply stated, “a pending JPML transfer motion or conditional transfer order does not affect the jurisdiction of the transferor court or its ability to rule upon any pending motions.” *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044, 1046 (E.D. Wis. 2001) (*citing* Rules of Procedure of the J.P.M.L. R. 1.5 (now R. 2.1)); *see also General Elec. Co. v. Byrne*, 611 F.2d 670, 673 (7th Cir. 1979); *Livingston v. Hoffmann-La Roche, Inc.*, 2009 U.S. Dist. LEXIS 70242, 3-4 (N.D. Ill. Aug. 6, 2009) (*citing Ill. Mun. Ret. Fund v. Citigroup, Inc.*, 391 F.3d 844, 850-51 (7th Cir. 2004) (affirming the District Court's remand of a case after the JPML issued a CTO, but before transmittal of the final order to the clerk of the transferee district and explaining that “[t]he pendency of a conditional transfer order 'does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.'”) (quoting JPML Rule 1.5); *Terkel v. AT&T, Inc.*, No. 06 C 2837, 2006 U.S. Dist. LEXIS 42906 at *1 (N.D. Ill. June 9, 2006); *Rutherford v. Merck & Co.*, 428 F. Supp. 2d 842, 845 (S.D. Ill. 2006).

While Defendants accurately state that from 2012 until 2016, the JPML consolidated upwards of 100 separate actions (many, obviously bulk-filed), involving NFL football-players who alleged injuries from duties owed to them, as NFL football-players, this is beside the point for several reasons. First, the JPML created an MDL that has resolved through a settlement-class, save for the smallest handful of opt-out cases. It has not transferred a single tag-along action subsequent to the settlement effective date; all cases transferred through this process (as “tag-along actions”) have included settlement-class members. Finally, the consolidated cases were essentially identical; nor did they raise Massachusetts-specific issues or implicate the exact preemption analysis as here. Simply put, the prior JPML transfers are antithetical to this case.

III. THE BALANCE OF HARDSHIP DOES NOT FAVOR A STAY IN PROCEEDINGS

Defendants' claim that a stay in proceedings will not harm Plaintiff, and instead, that unless proceedings are stayed, Defendants will experience harm from "inconsistent rulings." To the contrary, Plaintiff will experience very real harm from a stay, whereas Defendants' harm from "inconsistent rulings" is dubious and hypothetical at best.

A. Plaintiff Will Suffer Significant Hardship If a Stay Is Granted

Beyond their confusing position that judicial economy favors three courts doing the work of (this) one, Defendants' also argue that Plaintiff will suffer essentially zero prejudice by granting their motion to stay, and that it is Defendants who stand to incur substantial hardship. This is flatly incorrect. Plaintiff desperately needs to advance her case; A.H. is fatherless, financially insecure and vulnerable to lengthy delays. Indeed, the Commonwealth of Massachusetts, which has tens of thousands of children playing football and exposed to the risks of CTE each fall, also has a strong interest in advancing Plaintiff's case.

In fact, where there are particularly unique interests in play—such as resolution of a pure-Massachusetts-law issue (e.g., consortium's independence)—the law and pragmatic concerns favor adjudication here and now. This Court has recognized as much in similar proceedings:

For a number of reasons, I find that it is proper and efficient to rule on the pending motions to remand rather than wait for the JPML to decide whether to transfer the cases to the MDL Court. The primary issue presented by the motions to remand requires consideration of [Massachusetts law] and an issue as to which the MDL Court, respectfully, has no superior experience or expertise. Further, it does not appear that the issue, involving as it does Massachusetts law, is one that is likely to arise in other diet drug litigation in other courts.

In re Diet Drugs Mass. Litig., 338 F.Supp. 2d 198, 201 (D.Mass. 2004).

The *Annotated Manual for Complex Litigation Fourth, 2017 edition* further supports judicial economy being best served through a transferor court's resolution of specific jurisdictional

issues and through a denial of a motion stay. *Ann. Manual Complex Lit.* § 22.35 (4th ed. 2017). This policy has been adopted by many other jurisdictions as well. In *McGrew v. Schering-Plough Corp.*, a defendant filed a motion with the MDL panel requesting that the case be transferred. 2001 WL 950790 (D. Kan. Aug. 6, 2001). Thereafter, the defendants filed a motion to stay all proceedings, including any ruling on the plaintiff's motion to remand, until the MDL decided whether to grant the motion to transfer. The *McGrew* court found no reason to stay the proceedings, or to delay ruling on plaintiff's motion to remand. *McGrew v. Schering-Plough Corp.*, 2001 WL 950790, *3 (D. Kan. Aug. 6, 2001). Citing Rule 1.5 (now Rule 2.1), the *McGrew* court reasoned that "[f]or purposes of judicial economy, the jurisdictional issue should be resolved immediately. If federal jurisdiction does not exist, the case can be remanded before federal resources are further expended...[J]udicial economy dictates a present ruling on the remand issue." *Id.* (citing *Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft*, 54 F.Supp.2d 1042, 1048 (D. Kan. 1999)); *see also Am. Sales Co. v. Warner Chilcott Public Ltd. Co.*, No. 13-347-S, 2013 WL 4016925 at *1-2 (D.R.I. Aug. 6, 2013) (denying stay and identifying the factors of prejudice to the non-movant, hardship to the movant in the event of a denial of a stay, and judicial economy).

Plaintiff's Complaint raises unique issues that are unlikely to arise in the other cases, and A.H.'s claim deserves particularized consideration on a Motion to Remand. *See Ann. Manual Complex Lit.* § 20.131 (4th ed. 2017). Judicial economy will not be advanced, in any respect, by delaying ruling on this issue, but A.H. will experience tangible harm as a result of such a delay.

B. Defendants Will Not Suffer Harm, and Misstate Their Supposed Prejudice

Defendants erroneously argue that they will suffer hardship without a stay and be burdened by potentially "inconsistent rulings." The motion-to-remand practice particular to this case, however, is entirely distinct from the motion practice in the Eastern District of Pennsylvania.

Rulings on this (LMRA preemption) issue—in the context of the NFL’s CBA—are already *all-over-the-map*. Simply being required to defend a suit does not in and of itself constitute a “clear case of hardship or inequity.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005); *accord Am. Sales. Co., LLC*, at *2. To the contrary, it is Plaintiff who will be greatly prejudiced by being forced to litigate her highly unique claim within a cookie-cutter system comprised of readily distinguishable cases.

1. References to The Unrelated MDL Are Misleading

Defendants devote substantial portions of their scattershot Motion to describing MDL proceedings, which warrant further context. MDL No. 2323 is highly unusual in a number of respects. Defendants are correct that a 20,000-member settlement-class of retired NFL football players suing for injuries sustained expressly “while playing professional football”, specifically “from NFL football”¹⁰, “settled” their claims many years ago, before even the filing of Defendants’ Answer, by and through MDL No. 2323. Consequently, the MDL Court has devoted incredible resources toward its oversight of this historically complex settlement implementation. This oversight, however, has come at the expense of the remaining litigants, for whom little time is left over in light of their exceedingly small number.

As Defendants openly acknowledge, only the smallest handful of “opt-out” actions remain in MDL No. 2323.¹¹ Out of an estimated 20,000 claimants to a settlement fund, 99.7% are now part of the “settlement”, an adversarial claims process that commands daily oversight. Only 32

¹⁰ See, *In re Nat’l Football League Players’ Concussion Inj. Litig.*, No. 2:12-md-2323-AB, (ECF 1, filed 01/31/12); *compare with* D.E. 1-A (Compl.), which makes no distinction between NFL and non-NFL-football-related injuries; it alleges a lifetime of concealed information led to CTE.

¹¹ Two cases of NFL players unretired by the class-period’s closing increase the number to 34.

“opt-out” cases remain to be litigated, but are essentially stalled. Moreover, the substance and posture of those (opt-out) cases are quite different from Plaintiff’s Complaint. Twenty of these “opt-out” cases comprised one filing directed at distinct defendants from Plaintiff’s Complaint; only 12 “opt-out” cases overlap with the Defendants sued here.¹² Of particular note, the batch of twenty cases (where plaintiffs sued different defendants) had already received a transferor Court’s Order *denying a stay*, and *granting their remand* (e.g., finding no federal jurisdiction) in May of 2014.¹³ Defendants’ counsel stubbornly *re-removed* these same 20 cases, and the second time was a charm; those defendants convinced the second judge not to act, and instead to punt the issue down-line. Without a transferor court’s ruling the second time, the JPML transferred the cases into MDL-2323. Eventually the MDL Court will re-remand these cases (it seemingly has no choice), but the MDL Court has not had time; for approximately three years these proceedings have remained stalled, buying those defendants time.

The other 12 “opt-out” cases involve Defendants NFL and NFL P and also await preemption ruling. But these cases are before the Court on a 12(b)(6) (non-jurisdictional) posture, litigating the *affirmative defense* of the NFL’s CBA and LMRA (e.g., the Defendants have not moved to dismiss under the arbitration provision of the CBA and Federal Rule of Civil Procedure 12(b)(1)); the jurisdiction of the federal court is not at issue in these proceedings. These cases,

¹² Defendants correctly note that undersigned counsel represents the family of another non-opt-out Settlement Class Member, who died in Philadelphia, and whose case was therefore removed and merged into MDL without the opportunity for the Court or Plaintiff to contest the transfer. The motion-practice relating to this singularly unique case has already created a number of logistical problems.

¹³ See *Green v. Arizona Cardinals Football Club, LLC*, 21 F.Supp. 3d 1020, 1026 (E.D. Mo. 2014) (denying stay and granting remand); but see 4:15-cv-1903 (ECF 1) (Defendants re-removed the same case and it was transferred prior to a remand order).

too, have not advanced for the past three years. They are bound by a Master Complaint and are distinct in a number of critical respects from Plaintiff's individual Complaint, which is presently pending before this Court.

2. The Cat Is Already Out of the Bag: Litigation of These Matter is Ongoing in Multiple Venues Outside of the MDL

In the interim, based on a series of individualized remand rulings and denials of motions to stay, there have already been six so-called "inconsistent" rulings.¹⁴ Moreover, the NFL has been sued for CTE-related wrongful death (an opt-out) in New York State Court and has been forced to file an Answer. Highly similar litigation is also pending as to Riddell in Chicago. Thus, contrary to Defendants' position, there is already pending litigation outside of the MDL Court.¹⁵ Finally, there are startlingly few cases within the MDL remotely analogous to Plaintiff's Complaint, making Defendants' proposed consolidation all the more dubious.

3. The Benefit of Consolidation Is Gone

Based on the totality of these circumstances, the supposed fear of prejudice is moot. What the NFL seeks to do is simply *not litigate*. The 12 "opt-out" federal actions would remain

¹⁴ *Green*, 21 F.Supp. 3d at 1020 (remanding brain-injury claims of retired NFL football players); *Oliver v. Riddell*, No. 16-cv-4760, 2016 WL 7336412 at *2 (N.D. Ill. Jul. 19, 2016) (remanding claims alleging the civil conspiracy and concealment between these Defendants); *Duerson v. Nat'l Football League*, No. 12-CV-2513, 2012 WL 16558353 (N.D. Ill. May 11, 2012) (preempting a negligence claim against the NFL unplead here after first denying a stay); *Maxwell v. Nat'l Football League*, No. 11-cv-08394, Dec. 8, 2011, Order (C.D. Cal.) (*unpublished*; preempting a negligence claim); *Pear v. NFL*, No. 11-cv-08395, Dec. 8, 2011, Order (C.D. Cal.) (same); *Barnes v. NFL*, No. 11-cv-08395 Dec. 8, 2011, Order (C.D. Cal.) (same).

¹⁵ *DeCarlo v. NFL*, No. 161644/2015, 2017 WL 384258 (N.Y.S. Jan. 27, 2017) (denying NFL's Motion to Dismiss on statute of limitations grounds where decedent played football in 1950s); *In re Riddell Football Helmet Litig.*, 2016-L-012370 (Ill. Cir. Ct. Cook Cty.) (approximately 100 cases with identical discovery).

unaffected by this Court’s preemption ruling, and the 20 re-removed “opt-out” cases will be heading back to Missouri eventually. Meanwhile, at the same time: the Riddell Defendants have moved the MDL court for severance; and none of the MDL Plaintiffs want to remain inside the MDL. Indeed, the only parties that continue to unqualifiedly prefer the consolidated (paralyzed) approach are two of the self-proclaimed triumvirate of NFL Defendants sued here. (*see* D.E. 2 (Defs’ corporate disclosures)).

While Defendants further point out that the JPML has granted 100-200 conditional transfer orders¹⁶, it is critical to note once more that these transfers were almost exclusively pre-settlement-class cases, transferred pre-effective-date by willing plaintiffs whose attorneys are largely members of the MDL steering committee. Indeed, as the JPML correctly noted in January of 2012, “the majority of the parties support centralization ...”; now, the majority—indeed almost the entirety of would-be litigants—seek an end to consolidated proceedings; and one defendant (Riddell) seeks severance. MDL No. 2323 has reached “a certain point [where] the benefits of transfer should not be assumed to continue.” *In re Chkg. Acct. Overdraft Litig.*, 818 F.Supp. 2d 1373 (J.P.M.L. 2011).

IV. NEITHER PLAINTIFF NOR DECEDENT ARE SETTLEMENT-CLASS MEMBERS.

Amidst this backdrop, Defendants have conjured up a pseudo-issue they hope can distract the Court into issuing an otherwise-unjustifiable stay. Following a lengthy series of communications, Defendants now conveniently argue (a) that the decedent, a non-party, is an MDL 2323 Settlement Class Member, and bound by a remedy-less settlement, effectuated prior to his retirement; (b) that this settlement’s supposed release of *decedent’s* claims also operates as a

¹⁶ Defendants expect a conditional transfer order to issue shortly. Plaintiff will oppose any such order.

bar to his daughter's independent parental consortium claim; and (c) that settlement-class membership is, itself, *jurisdictional*, exclusively so to Judge Brody. None of this is accurate, if even possible.

Defendants focus on the decedent's release from the New England Patriots in 2013, but simply ignore the fact that the decedent never retired (as required to fall within the settlement's definitions). Though everyone can agree the decedent was not on an NFL roster, this is beside the point. The decedent had a contract contended to be binding through the 2014-15 NFL league year, *and* the decedent never filed for his retirement/severance benefit-a right upon retirement. No retirement paperwork was ever filed on behalf of the decedent and the salary dispute continues through today.

And of course, the foregoing presumes that the settlement could somehow release rights that did belong to the decedent or not flow through the decedent in the first place; particularly where the settlement provides zero in the way of a remedy. Plaintiff's parental consortium claim is independent of the decedent and only requires proof of the parent's tortious injury. To the extent the decedent failed to opt out by 10/14/14 to protect his *own* rights, a position Plaintiff believes lacks any factual support, this still cannot operate to release of his daughter's independent tort claim.

It is under this premise that Defendants are arguing that Judge Brody (MDL No. 2323) has ongoing and *exclusive* jurisdiction. Leaving aside that Defendants offer pure conclusions as support for this argument, it fails on its face: Judge Brody, and indeed *any judge*, could not resolve a settlement-class-membership dispute in advance of her resolution of subject-matter jurisdiction. To the extent that Defendants are able to enjoin state-court litigation upon remand (which seems like a stretch, notwithstanding their stated intent to do so), this further demonstrates why a remand

ruling would not prejudice them. But absent jurisdiction, Judge Brody could never reach this issue. Indeed, the only threshold issue is LMRA jurisdiction.

CONCLUSION

WHEREFORE Plaintiff asks the Court to deny Defendants' Motion to Stay and for all other relief deemed just and proper.

Respectfully submitted on behalf of Plaintiffs,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 20th day of November 2017 that true and accurate copies of the foregoing Notice was served via ECF and electronic mail to all counsel of record.

/s/ Bradford R. Sohn
Bradford R. Sohn, Esq.